and 17th November, 1953, he received some share of the profits, paid in small sums from time to time, amounting to $550. No account was rendered or gone into. He made several attempts to obtain from the defendants accounts of the partnership business in the presence of their fellow-countrymen. He even sought the good offices of an Imam of their own sect and the Kathi of Kuala Lumpur to effect a settlement between him and the defendants. All those were of no avail, so the plaintiff instituted this suit in January, 1956, praying for an account to be taken and payment of any sum of money found due to him.

The defence of both defendants at first was only a complete denial of the existence of the partnership, but at the beginning of the trial, with the consent of plaintiff's counsel, an amended statement of defence was accepted in which a statutory defence under section 8 of the Registration and Licensing of Businesses Ordinance, 1953 was set up to the effect that the plaintiff's claim was not maintainable as the partnership business had not been registered.

Plaintiff produced six witnesses in spite of his statement to the Kuala Lumpur Kathi (D.W.1) on 24th December, 1955 that he had no witnesses to the transaction. Of those witnesses one (P.W.3) spoke of overhearing the conversation in an eating shop at Serdang between the plaintiff and the defendants of the partnership and of seeing plaintiff handing $200 to the second defendant. Another witness (P.W.5) spoke of the plaintiff telling him in a coffee shop, in the presence of both defendants, that he had given the defendants $200 in relation to a business in which he held a share. Three witnesses (P.W.1, P.W.2 and P.W.7) testified to being present at a gathering in a railway godown on 17th June, 1953, where both defendants admitted the existence of the partnership but maintained that the plaintiff had been paid more than his share. The sixth witness was the Imam (P.W.6) who said that in his attempt to effect a settlement the second defendant admitted the partnership. None of those witnesses could be described, except perhaps P.W.3, as being a witness to the transaction itself. But then P.W.3 happened to be in the same eating shop, was seated at a different table and took no part in the discussion. I was satisfied from their demeanour that they are sincere witnesses and were not procured specially for this case. It is unthinkable that the Imam would perjure himself. On the facts I found that a partnership existed between the parties.

As regards the statutory defence, I consider it should fail in the light of the Privy Council judgment in *Sterios Thomopulos & Anor. v. John Mandilas*[1], where the question of a provision corresponding to section 8 of the Registration and Licensing of Businesses Ordinance, 1953 was decided. The following appears in that judgment:—

> "Their Lordships read section 14 as referring only to claims made by the defaulting firm against third parties. They can find no provision in the Ordinance which affects the right of one partner in a firm, which has failed to comply with the Ordinance, to bring an action against his co-partners, and they see no reason why any such provision should be implied."

Counsel for the defendants raised two additional defences in his final address, one of which was that the plaintiff being a police constable at the time was prohibited from entering into business, and the other was laches. I dismissed both of them not only because they were not pleaded but also in so far as delay was concerned the evidence of the plaintiff, which I have accepted as being true, explained that he would rather have the dispute settled outside than resorting to Court. The other defence is answered by the fact that there was no prohibition such as there is in section 15 of the Police Ordinance.

I therefore gave judgment for the plaintiff as claimed, except for interest. I also decreed that the partnership be dissolved and awarded costs to the plaintiff against both defendants.

Claim allowed.

Solicitors: *Bannon & Bailey; Shearn, Delamore & Co.*

ONG KENG HUAT v. SHAW & SHAW LTD.

[C. A. (Mathew C.J. (F.M.), Whyatt C.J. (S) and Rigby J.) September 26, 1956]

[Penang — F.M. Civil Appeal No. 22 of 1956]

Landlord and Tenant — Claim for possession on ground that rent lawfully due is in arrear — Waiver of tender of rent — Effect of — Claim for double rent — Civil Law Ordinance (S.S. Cap. 42), s. 13(4) — Control of Rent Ordinance, 1948, ss. 13 & 14.

In March 1952 the respondents purchased certain premises of which the appellant was the monthly tenant. From April to November 1952 the monthly rent was tendered to and accepted by the respondent. On October 13, 1952 the respondents through their solicitors gave notice to quit to the appellants, terminating the tenancy on November 30, 1952. Thereafter the monthly rents for December 1952 and January to April 1953 inclusive were tendered to and refused by the respondents through their solicitors. On May 11, 1953 the appellant's solicitors wrote to respondents' solicitors enclosing a cheque for the monthly rent for May. The letter pointed out that the monthly rent for the last five months had been tendered and refused and asked if the respondents would agree to waive all future tenders of rent. The respondents' solicitors replied returning the cheque for the May rent and stating that the respondents were prepared to agree to waive future tenders of rent. On October 8, 1954 the respondents' solicitors wrote to appellant demanding payment of arrears of rent. The appellant in his evidence said that he did not see this letter till January 1955.* On October 26, 1954 a notice to quit was sent to the appellant. Subsequently the respondents instituted proceedings against the appellants. The trial Judge made an order for recovery of possession of the premises and for payment of arrears of rent and *mesne profits*. The appellant appealed.

Held: (1) the effect of the waiver of tender of rent was that there was no arrears of rent but at most only a debt due from the appellant to the respondents, the payment of which had been voluntarily suspended by the express consent of the respondents;

(2) the respondents had therefore failed to prove that the rent of the premises lawfully due was in arrear and the claim to possession must therefore fail on this ground;

(3) the claim for double rent could not apply to a tenant of premises to which the Control of Rent Ordinance applies "unless and until an order of ejectment against such tenant had been made" and therefore the learned trial Judge had no power at the time of giving judgment to order payment of double rent.

Cases referred to:—

(1) *Smith v. Poulter* (1947) K.B. 339.

(2) *Saffron Walden Second Benefit Bldg. Society v. Rayner* 14 Ch. D. 406.

(3) *Davies v. Warwick* (1943) K.B. 329.

(4) *Luang Bhasa Bheraj & Anor. v. Tan Kim Lean* (1948) M.L.J. 78.

(5) *Ally & Co. v. Chellamah* (1948) M.L.J. 202.

CIVIL APPEAL.

B. K. Das (*Oh Cheow Hong* with him) for the appellant.

F. G. Pooley for the respondents.

Rigby J. (with whom **Mathew C.J. (F.M.)** and **Whyatt C.J. (S.)** agreed) :—This is an appeal from the judgment of Mr. Justice Spenser Wilkinson ordering the recovery of possession, as against the appellant, of certain premises, known as No. 105A, Tek Soon Street, Penang, hitherto occupied by the appellant as a monthly tenant, and for payment of arrears of rent and mesne profits.

For the purposes of this appeal it is of importance to consider the written pleadings of the parties to the action. The respondents by their Statement of Claim, averred that the tenancy had been "duly determined by a notice to quit in writing dated the 26th day of October, 1954" and that "the rent of the said premises lawfully due has been in arrear since the 1st day of December, 1952 and accordingly at the date of the service of the said notice was in arrear for upwards of fourteen days".

The appellant, in his defence, admitted that the respondents were the owners of the land on which the building stood, but contended that he was the owner of the building itself. In paragraphs 8 and 9 of his defence he denied that the tenancy had been duly determined as alleged "because the said notice to quit was ambiguous, misleading and bad in law". He further denied that the rent was lawfully due in arrear as alleged and averred that the respondents had "waived the tender of rent from the defendant (appellant) on the 11th May, 1953".

From the notes of evidence and from the brief judgment of the learned trial Judge it is apparent that the trial proceeded almost entirely on the issue raised as to the ownership of the building on the land; an issue which the Judge found no difficulty in determining in favour of the respondents in ordering recovery of possession.

The appellant, however, was admittedly a statutory tenant and, as such, protected under the provisions of the Control of Rent Ordinance. In such cases it is settled law that even if the point is not pleaded or raised by the tenant, no Court, whether original or appellate, can make an order for possession unless it is shown that one of the grounds for possession specified by the Act or Ordinance exists. See *Megarry* on Rent Acts, 8th Edn. p. 230 and the observations of Denning J. (as he then was) in *Smith v. Poulter*[1].

In this case, the sole ground upon which recovery of possession was claimed was founded upon section 13(1)(a) of the Control of Rent Ordinance that "at the date of the service of the notice determining the tenancy given by the landlord, rent lawfully due was in arrear for fourteen days or upwards". That allegation was specifically traversed by paragraph 9 of the Defence on the ground that there had been waiver of rent. But even if it had not been so traversed the onus was upon the respondents to prove the fact before the Court had jurisdiction to make an order for recovery of possession.

Turning now to the facts of the case. By an Indenture dated 21st March, 1952 the respondents purchased the premises under consideration, together with other premises, from the then owner. The appellant was then in possession as a monthly tenant. From April to November, 1952 the monthly rent was tendered to, and accepted by, the respondents. On the 13th October, 1952, the respondents, through their Solicitors, gave notice to quit to the appellant, terminating the tenancy on the 30th November. The appellant, by holding over, thereby became a statutory tenant. Thereafter, the monthly rents for December, 1952, and January to April, 1953, inclusive, were tendered to, and refused by, the respondents through their Solicitors. On the 11th May the appellant's Solicitors wrote to the respondents' Solicitors enclosing a cheque for the monthly rent for May. The letter pointed out that the monthly rent for the last five months had been tendered and refused and concluded with the sentence :—

"If your clients are not prepared to accept any further rent will you agree to waive all future tenders of rent?"

On the same day the respondents' Solicitors replied in writing to that letter. In the course of their reply

they returned the cheque for the May rent and concluded their letter with the sentence :—

"Our clients are prepared to agree to waive future tenders of rent. Please acknowledge receipt."

On the 8th October, 1954 — some seventeen months later — the respondents' Solicitors wrote to the appellant in the following terms :—

"Dear Sir, 8th October, 1954.

105-A Tek Soon Street.

We are instructed by Shaw & Shaw Ltd. to demand payment by you of the arrears of rent due in respect of the above mentioned premises as a statutory tenant.

Yours faithfully,

Ong Keng Huat, Esq.,
11, Tanjong Tokong Road,
Penang.

It is, perhaps, worthy of comment to observe, first, that that letter was apparently sent by ordinary, as distinct from registered, post and, secondly, that it was addressed to the appellant at his home address, as distinct from previous correspondence in connection with the premises, which correspondence had in the past been addressed to him at his office. The appellant, in his evidence, stated that from October to mid-January, 1955, he was away most of the time in Singapore in connection with his business as a film producer and that he did not see that letter of the 8th October until it was handed to him by his servant some time in January, 1955. A copy of that letter of the 8th October, together with a covering letter, was sent to the appellant's Solicitors. The learned trial Judge, in his judgment, stated that he was unable to accept the evidence of the appellant that he was unaware of the written demand for rent which was sent both to him and to his Solicitors. It is apparent from the record, however, that there was no evidence whatsoever before the Court as to when, where, or by whom, the letter was posted — if, indeed, it was posted — nor was there any evidence to rebut the appellant's testimony that he was not aware of the existence of that letter till the middle of January. The letter itself is not referred to, nor relied upon, by the respondents in their pleadings. If any importance on the question of time of its receipt by the appellant was to be attached to that letter then, in my view, clearly the onus of proving it was upon the respondents. The case of *Saffron Walden Second Benefit Building Society v. Rayner*[2] is, in my view, sufficient authority for the proposition that the mere fact that a copy of that letter was sent to the Solicitors who had formerly acted for the appellant could not be deemed to be good service upon the appellant for the purpose of the contents of that letter unless the Solicitors had authority from the appellant, expressed or clearly implied, to act upon it. There is nothing on the record to indicate that they had any such authority, whether express or implied. It is true that the appellant's Solicitors had acted for him in 1952 and up to May, 1953, but there was no correspondence between May, 1953 and the copy of the letter sent to the appellant's Solicitors on the 8th October, 1954.

On the 26th October a Notice to Quit was sent to the appellant. The Notice to Quit was in the following terms :—

"We are instructed by Shaw & Shaw Ltd., Singapore to give you notice and we hereby give you notice to quit and deliver up peaceful possession of the premises No. 105-A, Tek Soon Street, Penang which you hold as a statutory tenant for our clients at a monthly rent of $68.75 on the 30th day of November, 1954 next or at the end of the month of your tenancy which will expire next after the end of one month from the date of the service of this notice, the rent lawfully due being more than 14 days in arrear.

Particulars of Amount Due.

1st December, 1952 to 31st October 1954
being 23 months at $68.75 per month = $1,581.25.

In default of your compliance with this notice our clients will take such proceedings against you as they may be advised."

Again, a copy of that Notice to Quit was sent to the appellant's Solicitors with a covering letter. Again, there is no evidence as to the date of posting of that Notice to Quit, nor is there any evidence as to the date of service. The appellant himself, however, stated that he first came to know of the existence of the Notice to Quit at the end of November, when he saw it amongst the papers in his office on his return from Singapore.

On those facts, it is clear that before the trial Court had jurisdiction to make an order for the recovery of possession it required to be satisfied, in accordance with the provisions of section 13 (1) (a) that at the date of service of the Notice to Quit — admitted by the respondents to be some time towards the end of November — the rent lawfully due was in arrear for fourteen days or upwards. Section 13 (1) (a) contains the following proviso :—

"Provided that rent shall not be deemed to be in arrear if the tenant proves that it was tendered before such date;"

By paragraph 2 of the Statement of Claim the respondents alleged that the rent was in arrear since the 1st day of December, 1952. It is abundantly clear that that allegation was, and is, wholly incorrect — and, indeed, was specifically traversed in paragraph 8 of the defence. It is clear that the rent was regularly and consistently tendered by the appellant, through his Solicitors, for the five months from December, 1952 up to, and including, May, 1953 and that it was on each occasion returned by the respondents, through their Solicitors. Thereafter, from the 11th May, 1953,

future tenders of rent were waived with the express consent of the respondents, through their Solicitors. Then, on the 8th October, the respondents, through their Solicitors, sent the letter to the appellant demanding payment of the "arrears of rent". In my view, there were no arrears of rent due at that time. There was, at most, a debt due from the appellant to the respondents, the payment of which had been voluntarily suspended by the express consent of the respondents. If that voluntary suspension was to be terminated then the appellant was entitled to notice of termination and, in my view, a reasonable time thereafter, within which to pay that debt. To describe the debt as "arrears of rent due" is, in my view, a complete misnomer and. indeed nullifies the meaning and effect of the proviso to the sub-section that "rent shall not be deemed to be in arrear if the tenant proves that it was tendered before such date".

I would, therefore, allow this appeal on the simple, but nevertheless substantial, ground that the respondents wholly failed to prove, as alleged by them in their Statement of Claim, that "the rent of the said premises lawfully due has been in arrear since the 1st day of December, 1952 and accordingly at the date of the service of the said Notice was in arrear for upwards of fourteen days".

Mr. Pooley, in the course of his argument on behalf of the respondents, contended that arguments had been put forward by the appellant in the course of this appeal which had not been advanced in the trial Court. He accordingly asked leave to amend his pleadings during the hearing of the appeal by adding an alternative paragraph as follows :—

"That the rent lawfully due on the 1st November, alternatively 31st October, was in arrear for fourteen days or upwards at the date of the service of the Notice to Quit."

For a variety of reasons I myself would not be disposed to allow any such amendment at this stage. First, it is clear that the allegation that there were any arrears of rent lawfully due was specifically denied in the defence, on the ground that there had been express waiver. The matter was, therefore, put in issue on the pleadings. The fact that the case took a different course at its trial is immaterial. Adopting the words of Goddard L.J. in *Davies v. Warwick*[3]:—

"Here the point on which we have decided the case necessarily arose in the Court below, because it was apparent on the pleadings. The fact that wrong arguments were adduced in support of the case does not disentitle the plaintiff from availing himself of the right arguments in this Court".

Secondly, as I understand it, the object of Mr. Pooley's amendment would be with a view to establishing that the so-called arrears of rent referred to in the letter of the 8th October, 1954, had not been paid by the date towards the end of November when the appellant, on his own admission, became aware of the existence of the Notice to Quit. In my view that application for amendment, even if allowed, would fail for two reasons. First, that the onus of establishing that the appellant had received, or had knowledge of the contents of, that letter of the 8th October, was upon the respondents and there was no evidence that the appellant had either received, or had knowledge of the contents of, it at any time prior to the date he received the Notice to Quit. There was, therefore, no evidence before the Court that the rent was in arrear for fourteen days or upwards at the date of the service of the Notice to Quit. Secondly that even assuming he had received the letter of the 8th October fourteen days or upwards before he received the Notice to Quit, that letter amounted to no more than a notice to the appellant terminating the previous agreement to waive payment of the rent due and requesting payment of the debt at some time in the future. Such a request, in my view, of necessity imported a reasonable time to pay the debt. Even assuming that the letter was received on or about the 10th October — and it is, I repeat, an assumption unsupported by the evidence — I, for my part, and for the following reasons, would not be prepared to hold that the intervening period of approximately six weeks was a reasonable time, in the particular circumstances of this case, for payment of the debt so as to give rise, in default of such payment, to a claim for eviction on the basis that rent lawfully due was in arrear for fourteen days or upwards. In this case the appellant became a statutory tenant by virtue of holding over after receipt of the Notice to Quit dated the 13th October, 1952. Thereafter, the rent was regularly tendered and refused. It is said that payments were refused because proceedings were pending before the Rent Board for permission to apply to the Court, on other grounds, for recovery of possession. Those proceedings were, in fact, unsuccessful. It is clear, however, that acceptance of the rents tendered by the appellant would not have prejudiced the position of the respondents in any proceedings then pending since receipt of rents from a statutory tenant does not affect the existence of the statutory tenancy, the tenant being regarded as holding over against the will of the landlord by virtue of the Ordinance. See *Luang Bhasa Bheraj & Anor. v. Tan Kim Lean*[4].

The language of Briggs J. in *M. M. Ally & Co. v. Chellamah*[5] seems to me singularly appropriate in its application to this case :—

"A man cannot, by his own deliberate default, create an artificial default in another. If a landlord, by one device or another, prevents his tenant from properly paying his rent, he may not cease to be able to recover the monies concerned; but he cannot thereafter come to Court and claim an advantage (the right to ejectment),

which, but for his own . . . conduct, the law would have refused."

If the appellant in this case has not paid the so-called arrears of rent the respondents have only themselves to blame for not accepting such rent when it was regularly and consistently offered to them.

There remains one further matter for consideration. The learned trial Judge gave judgment in accordance with the respondents' claim for mesne profits from the 30th day of November, 1954, at the rate of $137.50 per month, being double the rental value of the said premises. Mr. Das, in the course of his able and lucid argument in this case, submitted — and Mr. Pooley conceded the validity of the argument — that the Court had no jurisdiction to order double rent. The claim for mesne profits on the basis of double rent was admittedly made in reliance on the provisions of section 13(4) of the Civil Law Ordinance (Laws of the Straits Settlements, Vol. II, Cap. 42), which enables a landlord to claim double rent in the case of a tenant holding over after the determination of his tenancy up to the time he surrenders possession thereof. Section 17, however, of the Control of Rent Ordinance, 1948, as amended, expressly enacts that section 13(4) of the Civil Law Ordinance shall not apply to a tenant of premises to which the Control of Rent Ordinance applies "unless and until an order of ejectment against such tenant has been made". An order of ejectment means, of course, an order made by the Court. It is apparent that this provision of the Control of Rent Ordinance was overlooked and the learned trial Judge had no power, at the time of giving judgment, to order payment of double rent. The amount involved by the judgment and consequential order for payment of double rent amounts to $1,203.12.

For these reasons I would allow the appeal and set aside the judgment of the lower Court for recovery of possession of the premises. The respondents are entitled to such rent at the rate of $68.75 per month as may be due to them from the 30th day of November, 1954 up to the date of delivery of this judgment. The appellant is entitled to recover the sum of $1,203.12 already paid by him by way of double rent. The appellant is entitled to his taxed costs, both here and in the lower Court.

Appeal allowed.

Solicitors: *Oh Cheow Hong; Presgrave & Matthews.*

HAJI SAUD v. HAJI AHMAD & ANOR.

[C. A. (Mathew C.J. (F.M.), Whyatt C.J. (S), and Rigby J.) October 18, 1956]

[Penang — F.M. Civil Appeal No. 53 of 1955]

Administration of Estates Enactment (Kedah No. 1), s. 45 — Sale of immovable property by administrator — Permission of the Court — Whether administrator can enter into agreement for sale.

This was an appeal against an order for the specific performance of agreement for sale of immovable property. The appellant who was the administrator of the estates of two deceased persons made an agreement for sale of the land the subject of the appeal with the respondents. The respondents were put in possession of the land but the administrator took no steps to register the respondents as owners of the land. It was argued on appeal that, as section 45 of the Kedah Administration of Estates Enactment provided that an administrator shall not transfer by sale any immovable property vested in him without the permission of the Court, there was no agreement to sell the land but only an agreement to seek the permission of the Court to sell the land after such permission had been granted.

Held: (1) an administrator can enter into an agreement for the sale of immovable property but the agreement is unenforceable unless the permission of the Court is obtained;

(2) the High Court is empowered in cases of this kind to give the permission required under section 45 of the Enactment, and if such permission is not given, the Court of Appeal is empowered to do so.

Cases referred to:—

(1) *Gan Hong Hoe v. Aziz Beg* (1954) M.L.J. 202.

(2) *Salmiah v. Lim Soo Kok* F.M. Civil Appeal No. 32 of 1955 — unreported.

(3) *Haji Osman v. Sayid Noor* (1952) M.L.J. 37.

CIVIL APPEAL.

M. Knorpel for the appellant.

Lee Theam-Chu for the respondents.

Mathew C.J. (with whom **Whyatt C.J. (S.)** and **Rigby J.** concurred): — The appellant is the administrator of the estates of Haji Mohamed Ali (deceased) and Zahara binti Taha (deceased). In 1942 in the presence of the beneficiaries the appellant as administrator made an agreement for sale of the land the subject of this appeal. Two thousand dollars was paid as purchase price and distributed amongst the beneficiaries. The title deed to the land was handed to the first respondent, and the two respondents were put in possession of the land and are still in possession. The administrator took no steps to register the respondents as owners of the land and in consequence these proceedings were started.

The appellant was unrepresented in the High Court, and the issues which were considered at the trial were :—